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C.G., Appellant)	
)	
and)	Docket No. 21-0495
)	Issued: April 13, 2022
DEPARTMENT OF DEFENSE, DEFENSE)	
COMMISSARY AGENCY, LITTLE CREEK)	
COMMISSARY, Norfolk, VA, Employer)	
)	

Case Submitted on the Record

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On February 15, 2021 appellant filed a timely appeal from November 3, 2020 and January 6, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issues are: (1) whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective October 11, 2020, finding that her actual earnings as a Front Desk Associate fairly and reasonably represented her wage-earning capacity; (2) whether appellant

² The Board notes that, following the January 6, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

received an overpayment of compensation in the amount of \$3,794.00 for the period December 16, 2019 through March 28, 2020 for which she was without fault, because she continued to receive compensation for total disability following her return to work; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board regarding different issues.³ The relevant facts are as follows.

On July 27, 2003 appellant, then a 38-year-old commissary support clerk, filed a traumatic injury claim (Form CA-1) alleging that, on July 24, 2003, she sustained a low back sprain when she stood on a crate and reached for a bottle of liquid detergent, which was stacked up high, while in the performance of duty. She stopped work on July 24, 2003 and returned on July 27, 2003. The record indicates that appellant was a part-time employee and worked a schedule of 64 hours biweekly. OWCP initially accepted the claim for right shoulder sprain/strain and lumbar sprain/strain. It later expanded the acceptance of the claim to include other psychogenic pain.

Appellant was a probationary employee on the date of injury and her employment was terminated during her probationary period on November 17, 2003.⁴ On January 12, 2009 the employing establishment reinstated her to an administrative position with a work schedule of 32 hours per week. For the period August 24, 2011 through December 14, 2013, OWCP paid appellant wage-loss compensation on its supplemental rolls as the employing establishment did not have work available within her work restrictions. It paid her wage-loss compensation on the periodic rolls beginning December 15, 2013.

In a June 5, 2013 medical report, Dr. Kevin Hanley, a Board-certified orthopedic surgeon and OWCP second opinion physician, opined that appellant was partially disabled as a result of the employment injury and capable of working with restrictions.

Based on Dr. Hanley's opinion, appellant was referred for vocational rehabilitation services in December 2013. A vocational rehabilitation specialist developed a plan for appellant's reemployment as a receptionist, in accordance with the Department of Labor's, *Dictionary of Occupational Titles* (DOT) # 237.367.038, and appellant, with vocational assistance, eventually earned an associate degree. Placement assistance, however, was unsuccessful.

At a job fair, appellant was selected for a flex position as a Front Desk Associate with the Navy Installation Command. She returned to work on December 16, 2019 earning an hourly rate of \$11.00 for 32 hours per week. The position description included front desk and reservation functions for the lodging program. The duties included running and printing various reports, answering phones and transferring calls, logging in calls regarding complaints and ensuring the appropriate department was notified, relocating guests to different rooms, retrieving lost and found items and contacting guests, and performing other related duties as assigned. The work was

³ Docket No. 05-1700 (issued June 20, 2006); Docket No. 14-1339 (issued May 26, 2015).

⁴ The Equal Employment Opportunity Commission (EEOC) ordered that appellant be reinstated to her commissary support clerk position retroactive to November 17, 2003.

primarily performed in an office environment with physical requirements to include extended periods of standing, walking and lifting/carrying objects up to 30 pounds. In a January 6, 2020 letter, which appellant signed, the employer indicated that appellant would work in a light-duty capacity while reasonable accommodations were being considered.

In December 18, 2019 and January 15, 2020 reports, Dr. Ronald Bercasio, a Board-certified family practitioner, opined that appellant was able to return to modified work preferably in an office setting starting out part time 32 hours per week and gradually progressing to full-time work, with restrictions of no manual labor, no working for prolonged periods that involved overhead work, no heavy lifting greater than 20 pounds on a frequent basis, no prolonged standing more than 1 hour, squatting, kneeling, climbing, twisting, bending, and rotation. Appellant's required work accommodations included no work beyond 6:30 p.m., chair with back support and arm rest, and periodic work breaks as needed. Dr. Bercasio indicated that appellant's work restrictions were permanent and that she could work light-to-moderate demands within the mentioned modified duties.

By decision dated March 13, 2020, OWCP reduced appellant's compensation effective March 29, 2020 based on the constructed receptionist position at the rate of \$423.00 per week. It found that her employment as a Front Desk Associate was medically unsuitable as it was outside of her established medical restrictions as established by Dr. Hanley's May 5, 2013 medical report, which was more restrictive than Dr. Bercasio's restrictions.

On March 20, 2020 OWCP received the Navy Installation Command's January 22, 2020 letter, which granted appellant's reasonable accommodations. These accommodations were not scheduling her to work more than 32 hours per week, exempting her from working beyond 6:30 p.m., providing a chair, and allowing her to sit when needed. The accommodations were effective immediately and ran until May 8, 2020. It further advised that her accommodations would be reevaluated in April 2020.

On April 10, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on July 16, 2020.

By decision dated October 1, 2020, OWCP's hearing representative reversed OWCP's March 13, 2020 decision. The hearing representative found that the selected position of receptionist was not medically suitable at the time of OWCP's March 13, 2020 decision as it was a full-time position and Dr. Bercasio had only released appellant to 32 hours per week. The hearing representative also found that OWCP failed to adequately address whether or not appellant's actual wages were representative of her wage-earning capacity prior to issuing the decision on the constructed position. The hearing representative indicated that OWCP should determine whether appellant's employment as a Front Desk Associate met the criteria to determine her wage-earning capacity based on actual earnings.

On October 13, 2020 OWCP sought clarification of appellant's salary from the employing establishment. On October 22, 2020 the employing establishment noted that since appellant was a part-time, 32-week employee, her annual salary was not the full salary listed on the attached Standard Form 50 (SF-50). Rather, a part-time, 32-hour employee at a GS 4/5 level currently earned \$27,473.00 per year. On October 29, 2020 it advised that as of December 16, 2019, the

hourly rate for the date-of-injury position was \$16.51 or \$27,472.64 annually, based on 32 hours of work each week.

By decision dated November 3, 2020, OWCP issued a loss of wage-earning capacity (LWEC) determination. It found that appellant's employment as a Front Desk Associate fairly and reasonably represented her wage-earning capacity, based on the wages actually earned from December 16, 2019, and reduced her compensation effective October 11, 2020. It found that the weight of the medical evidence with regard to appellant's work restrictions rested with Dr. Bercasio's December 18, 2019 and January 15, 2020 medical reports and that the position was suitable as she had demonstrated the ability to perform the duties of that job for 60 days or more. A computation of compensation worksheet was included which documented the required application of the *Shadrick*⁵ formula used to determine appellant's wage-earning capacity of 67 percent. Based on the LWEC, OWCP determined that appellant would receive net compensation of \$457.82 every 28 days.

On November 25, 2020 OWCP applied the *Shadrick* formula to appellant's actual earnings of \$352.00 every week to determine that appellant's 28-day gross compensation rate would be \$511.00.

By letter dated November 25, 2020, OWCP advised appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$3,794.00 because she received wage-loss compensation for total disability for the period December 16, 2019 through March 28, 2020 after she had returned to work as a Front Desk Associate. It related that from December 16, 2019 to March 28, 2020 she had received a net amount of \$5,467.63, but should have received a net amount of \$1,673.63. OWCP indicated that from December 16, 2019 until March 28, 2020, based upon appellant's actual wages, she was entitled to wage-loss compensation in the gross amount of \$1,868.14, with deductions for basic life insurance of \$32.31, miscellaneous deductions of \$162.20 and a net amount of \$1,673.63. It also made a preliminary finding that she was without fault in the creation of the overpayment as there was no evidence in the case file to demonstrate that she knew, or should have known, the proper course of action to be followed. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written record, or a prerecoupment hearing.

In a December 21, 2020 letter, appellant responded to the preliminary overpayment determination. She disagreed with the amount of the overpayment. Appellant indicated that she was not paid the monies stated and that she did not understand why she would request waiver on something she had no absolute knowledge of or offer any of her financial information. She also noted that she would suffer unnecessary hardship if any money were taken. Attached to her letter was a Form OWCP-20 signed December 18, 2020 in which appellant requested that OWCP issue a decision based on the written evidence regarding possible waiver of recovery of the overpayment. Appellant disagreed with the fact and amount of the overpayment, and requested waiver of

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

recovery. She also indicated that she would experience hardship due to her financial situation. Appellant indicated that her monthly income was \$1,885.00 and her monthly expenses were \$1,300.00 for rent or mortgage, \$150.00 for food, \$175.00 for clothing, \$300.00 for utilities, and \$360.00 for other expenses. Copies of a November 17, 2020 electric bill and a November 29, 2020 auto insurance bill were provided. On December 27, 2020 OWCP received additional copies of monthly bills.

By decision dated January 6, 2021, OWCP finalized the preliminary overpayment determination, indicating that appellant had received an overpayment of compensation in the amount of \$3,794.00 for the period December 16, 2019 through March 28, 2020 as she continued to receive compensation for total disability following her return to work as a Front Desk Associate on December 16, 2019. It further found that she was not at fault in the creation of the overpayment, but denied waiver as she did not provide it with sufficient financial information to support a waiver determination. OWCP requested that appellant forward \$50.00 every month for recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.⁶ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁷

OWCP's procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not properly determine that appellant's actual earnings as a Front Desk Associate working 32 hours per week, effective October 11, 2020 fairly and reasonably represented her wage-earning capacity.

Dr. Bercasio, in reports dated December 18, 2019 and January 15, 2020, opined that appellant was able to return to modified work preferably in an office setting starting out part time 32 hours per week and gradually progressing to full-time work. He advised that she had permanent restrictions of no manual labor, no working for prolonged periods that involved overhead work, no heaving lifting greater than 20 pounds on a frequent basis, and no prolonged standing more than one hour, squatting, kneeling, climbing, twisting, bending and rotation and that she needed work accommodations of no work beyond 6:30 p.m., a chair with back support and arm rest, and periodic

⁶ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁷ *V.H.*, Docket No. 20-1012 (issued August 10, 2021); *Lottie M. Williams*, 56 ECAB 302 (2005).

⁸ See *L.J.*, Docket No. 14-0970 (issued August 21, 2014); Federal (FECA) Procedure Manual, Part 2-- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.2(b) (June 2013).

work breaks as needed. Dr. Bercasio indicated that appellant could work light-to-moderate demands within the modified duties as mentioned.

The Front Desk Associate position with the Navy Installation Command, however, requires extended periods of standing and walking and lifting/carrying objects up to 30 pounds. This employer provided appellant accommodations on January 22, 2020, after she started work on December 16, 2019. In providing appellant work accommodations, this employer did not change or clarify its standing or lifting requirements to meet Dr. Bercasio's permanent restrictions of no prolonged standing more than 1 hour and no heavy lifting greater than 20 pounds on a frequent basis. Furthermore, the work accommodations that this employer offered were temporary. It had specifically advised the accommodations were valid only until May 8, 2020 and would be reevaluated in April 2020. The physical requirements of the Front Desk Associate position were contrary to the restrictions set forth by appellant's own physician and, thus, the position was medically unsuitable.

The Board has previously explained that actual earnings do not fairly and reasonably represent wage-earning capacity if the medical evidence does not establish that the position was within the employee's work restrictions.⁹ As the Front Desk Associate position was not medically suitable, OWCP has not met its burden of proof to find that those earnings fairly and reasonably represented her wage-earning capacity despite the fact that she worked in such position for more than 60 days. The Board, therefore, finds that OWCP did not meet its burden of proof to establish that appellant's actual earnings in the Front Desk Associate position fairly and reasonably represented her wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹⁰

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.¹¹ This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.¹² OWCP's regulations provide, in pertinent part, that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.¹³ A claimant is not entitled to receive temporary total disability and actual earnings for the

⁹ See D.A., Docket No. 21-0267 (issued November 19, 2021).

¹⁰ 5 U.S.C. § 8102.

¹¹ *Id.* at § 8116(a).

¹² *Id.*

¹³ 20 C.F.R. § 10.500.

same period.¹⁴ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹⁵

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,¹⁶ has been codified at section 10.403 of OWCP regulations.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$3,794.00 for the period December 16, 2019 through March 28, 2020 for which she was without fault, because she continued to receive compensation for total disability following her return to work.

In light of the Board's finding above that OWCP improperly determined appellant's LWEC, appellant remained entitled to compensation for total disability. Therefore, the fact and amount of overpayment have not been established.¹⁸

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's wage-loss compensation, effective October 11, 2020, based on her actual earnings as a Front Desk Associate. The Board further finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$3,794.00 for the period December 16, 2019 through March 28, 2020.

¹⁴ *G.R.*, Docket No. 19-0940 (issued December 20, 2019); *J.H.*, Docket No. 17-0592 (issued May 1, 2018).

¹⁵ *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.2(a) (September 2018).

¹⁶ 5 ECAB 376 (1953); 20 C.F.R. §§ 10.403(d)-(e).

¹⁷ OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position. *See* 20 C.F.R. § 10.403(d). The pay rate for compensation purposes is then multiplied by the wage-earning capacity percentage. This amount is subtracted from the pay rate for compensation purposes to determine the loss of wage-earning capacity. *Id.* at § 10.403(e). The Board notes that under FECA, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in an LWEC. *See generally*, *Y.O.*, Docket No. 16-1886 (issued February 24, 2017); *Prince W. Wallace*, 52 ECAB 357 (2001).

¹⁸ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2020 and January 6, 2021 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: April 13, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board